

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

MIDAS GREEN TECHNOLOGIES,
LLC

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April 9, 2024

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VS.

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CIVIL ACTION NO. 6:22-CV-50

RHODIUM ENTERPRISES,
INC., ET AL.

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BEFORE THE HONORABLE ALAN D ALBRIGHT
PRETRIAL HEARING (via Zoom)

APPEARANCES:

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Proceedings recorded by mechanical stenography,
transcript produced by computer-aided transcription.

09:33 1 (Hearing begins.)

09:33 2 DEPUTY CLERK: A civil action in Case
09:33 3 6:22-CV-50, Midas Green Technologies, LLC versus
09:33 4 Rhodium Enterprises, Incorporated, et al. Case called
09:33 5 for a pretrial conference.

09:33 6 THE COURT: If I could have announcements
09:33 7 from counsel, please.

09:33 8 MR. SMITH: Your Honor, for plaintiff
09:33 9 Midas Green, Michael Smith. And with me today are
09:33 10 Mr. Joe Thomas, Mr. Bill Kolegraff, and Mr. Grant
09:33 11 Thomas; and we're ready to proceed.

09:33 12 MR. UNDERWOOD: Good morning, Your Honor.
09:33 13 Travis Underwood on behalf of the Rhodium defendants.
09:33 14 With me is my law partner Melissa Smith. We also have
09:33 15 from the Stris & Maher firm our lead counsel, Liz
09:33 16 Brannen, along with two other members from her firm,
09:33 17 Peter Brody and Sarah Rahimi; and we're ready to
09:33 18 proceed.

09:34 19 THE COURT: With this group, I feel like
09:34 20 I'm an honorary Eastern District of Texas judge. What
09:34 21 an honor. If I could have only been picked to serve
09:34 22 there.

09:34 23 I will take up first the motion to
09:34 24 correct inventorship. And I'll hear argument on that,
09:34 25 please.

09:34 1 Mr. Thomas, I think that's you, or
09:34 2 Mr. Kolegraff. Okay.

09:34 3 MR. KOLEGRAFF: Good morning. This is
09:34 4 William Kolegraff.

09:34 5 THE COURT: Good morning to you, sir.

09:34 6 MR. KOLEGRAFF: Yes. So this patent was
09:34 7 originally issued with seven named inventors. However,
09:34 8 during the process of preparing for this case for
09:34 9 trial, we discovered that six of the inventors should
09:34 10 not have been named. We provided a correction of
09:35 11 inventorship document, which was sent to the Patent and
09:35 12 Trademark Office about a year ago. We're still waiting
09:35 13 to hear back from them.

09:35 14 So what we did is, in an abundance of
09:35 15 caution, just in case we don't get this resolved by the
09:35 16 PTO by the time trial starts, we've asked the Court to
09:35 17 order the director of the office to correct the
09:35 18 inventorship. So right here, we believe we've met our
09:35 19 burden for clear and convincing evidence. Every one of
09:35 20 the --

09:35 21 THE COURT: Does that mean I get to tell
09:35 22 Kathi Vidal what to do, or is it someone else?

09:35 23 MR. KOLEGRAFF: Yes. You do. I could
09:35 24 help draft that order for you.

09:35 25 (Laughter.)

09:35 1 MR. KOLEGRAFF: But we do believe we've
09:35 2 met the burden for clear and convincing evidence.
09:35 3 First of all, the package that we have duplicated for
09:35 4 you in the filing is the exact package that we
09:35 5 submitted to the Patent and Trademark Office, which
09:35 6 meets all the statutory requirements. All the six
09:35 7 inventors that are being removed have signed
09:35 8 declarations that they agree that they should be
09:35 9 removed from the patent.

09:35 10 The remaining inventor, Christopher Boyd,
09:36 11 has agreed that he is the sole inventor. And Midas
09:36 12 Technology, the assignee of all the rights in interest
09:36 13 in the patent, has also agreed to this change. So we
09:36 14 don't see any reason why this can't be allowed because
09:36 15 there's clear and convincing evidence to remove these
09:36 16 inventors.

09:36 17 Now, Rhodium does try to muddy the water
09:36 18 and they bring up the names of two other people that
09:36 19 they say may be inventors, Rainone and Christian Best.
09:36 20 That really is irrelevant to this particular motion.

09:36 21 This motion is merely to remove six named
09:36 22 inventors that were wrongly named on the patent, and if
09:36 23 they believe others should be added, then they can take
09:36 24 that up at a separate -- separate matter. And just as
09:36 25 a point of interest, they don't have any standing to do

09:36 1 this anyway because they don't represent Rainone or
09:36 2 Christian Best, as far as we know.

09:36 3 THE COURT: Okay. Response?

09:36 4 MS. BRANNEN: Good morning, Your Honor.
09:36 5 Elizabeth Brannen from Stris & Maher on behalf of the
09:37 6 Rhodium defendants.

09:37 7 I guess we really should have briefed the
09:37 8 point about Ms. Vidal, who -- Director Vidal, who I
09:37 9 remember fondly as Kathi Kelly Lutton, but the reason
09:37 10 we think this Court should not tell her agency what to
09:37 11 do:

09:37 12 First of all, I think they say in their
09:37 13 reply, they expect the agency to rule soon anyway. So
09:37 14 there is the chance that we can just see what the
09:37 15 Patent Office does. But the reason I would ask the
09:37 16 Court to deny the motion is that the correct
09:37 17 inventorship is a disputed issue in our litigation.

09:37 18 We do contend that there are two omitted
09:37 19 inventors, who they're not even trying to add. And we
09:37 20 don't think the record that they've submitted to this
09:37 21 Court even tries to meet their clear and convincing
09:37 22 burden to prove that all six of the guys they say
09:37 23 should come off actually didn't contribute.

09:37 24 You know, two of them, and we've cited
09:37 25 examples in our brief, testified that they contributed

09:37 1 to conception of one or more aspects of the claimed
09:38 2 invention. So I don't -- if you grant the motion, we
09:38 3 don't believe you'd be correcting anything. We just
09:38 4 don't think they met their burden. And at this point,
09:38 5 it may be best to see what the agency does.

09:38 6 THE COURT: Anything else from the
09:38 7 plaintiffs?

09:38 8 MR. KOLEGRAFF: Yeah. Just on the issue
09:38 9 of disputes of inventorship, there is no dispute on the
09:38 10 removal of these six. Those six, all six, have agreed
09:38 11 to do this. All six have testified that they're not
09:38 12 inventors. All six have testified that they are
09:38 13 comfortable with, and believe it's correct, that
09:38 14 Christopher Boyd is the sole inventor.

09:38 15 That's all, Your Honor.

09:38 16 THE COURT: Anything else?

09:38 17 MS. BRANNEN: Your Honor, in our brief,
09:38 18 we cited testimony from two of them to the effect that
09:38 19 they contributed to conception, and so that would not
09:38 20 make it proper to remove them. We don't think they've
09:38 21 met the clear and convincing burden.

09:38 22 THE COURT: Okay. I'll be back in a
09:38 23 second.

09:38 24 (Pause in proceedings.)

09:43 25 THE COURT: Okay. I'm going to grant the

09:43 1 dismissal of the six; but with regard to the additional
09:43 2 two, I'm not sure -- I'll hear from defendant. I'm not
09:43 3 sure, procedurally, that issue is in front of me. I
09:43 4 don't think you're raising it in a response to a motion
09:43 5 properly put in front of me.

09:44 6 I'm really asking you. Is that wrong?
09:44 7 I'm thinking if it were, like, in a pleading or
09:44 8 something, it would be in front of me, or it's an issue
09:44 9 that the Patent Office should take up.

09:44 10 MS. BRANNEN: Good morning, Your Honor.
09:44 11 I think we would agree that doesn't -- the point I was
09:44 12 trying to make on this motion is, it wouldn't, from our
09:44 13 perspective, be a correction. So we were hoping the
09:44 14 Court would deny this motion on that basis. But I
09:44 15 think we can present evidence to the jury about whether
09:44 16 the patent is invalid for failure to list those two
09:44 17 individuals who we believe should be listed, who
09:44 18 they're not even asking you to add.

09:44 19 THE COURT: And have you raised that
09:44 20 issue formally in the case?

09:44 21 MS. BRANNEN: We have, Your Honor.

09:44 22 THE COURT: Okay. Okay. Well, then
09:44 23 we'll take that up at trial.

09:44 24 Next up, I have -- give me one second --
09:44 25 the motion to exclude rebuttal report and testimony of

09:44 1 Dr. Alfonso Ortega.

09:45 2 And for the record, I have: Paragraphs
09:45 3 91, 92, 133 through 146, 178, 184, 189 and 90, 213,
09:45 4 222, 239 and 277.

09:45 5 I'll hear argument on that, please.

09:45 6 MR. THOMAS: Good morning, Your Honor.
09:45 7 Joseph Thomas on behalf of the plaintiff Midas Green
09:45 8 Technology.

09:45 9 Your Honor, this is a case that is, in my
09:45 10 40 years of practice, I've never seen. A law firm
09:45 11 directly engage a party who was supporting an expert
09:45 12 and use the privilege to shield from discovery all
09:45 13 communications, all test data, all test parameters, and
09:45 14 produce nothing but a simple result file, which is what
09:46 15 happened here today -- or happened in this case.

09:46 16 We think the law's very clear under
09:46 17 Rule 26 that anything the expert relies upon must be
09:46 18 produced in a case, and had Mr. Ortega functioned, as
09:46 19 the defendants claim, as his support staffer -- is the
09:46 20 term that they've used -- all of this would have been
09:46 21 discoverable, none of this would have been hidden from
09:46 22 us.

09:46 23 And as it stands, the only thing we have
09:46 24 access to is a simple result file that, of course,
09:46 25 shows a result that Dr. Ortega likes and counsel for

09:46 1 Rhodium likes, but none of the underlying test
09:46 2 parameters, test conditions, test failures, the
09:46 3 convergence data has been produced. And this kind
09:46 4 of -- I guess it's almost a policy argument, I mean,
09:46 5 whether the Court would sanction and allow lawyers
09:46 6 to --

09:46 7 THE COURT: I got it. I got it.

09:47 8 Is there anything else you need to add?

09:47 9 MR. THOMAS: No, Your Honor. We briefed
09:47 10 this and it seems like you've read it. I would just
09:47 11 point out, we think the Cellular Communications
09:47 12 Equipment case is really on point here, and this report
09:47 13 should be excluded.

09:47 14 THE COURT: The portion -- the paragraphs
09:47 15 I just read out should be excluded, right?

09:47 16 MR. THOMAS: Well, we think the --
09:47 17 there's a basis to exclude the entire report. We've
09:47 18 also, alternatively, cited specifically paragraphs that
09:47 19 rely on and use in reference to this CFD report. I can
09:47 20 recite those for you if you want, Your Honor. They're
09:47 21 in our moving papers.

09:47 22 THE COURT: No. I -- okay.

09:47 23 I'll hear a response.

09:47 24 MS. BRANNEN: Good morning, Your Honor.

09:47 25 We think that the criticisms are wrong on

09:47 1 the facts about what happened, and also about the law.
09:47 2 So Dr. Ortega, to start with, opines that limitations
09:48 3 of the patent claims are missing and this motion, as I
09:48 4 think the Court has observed, only affects one
09:48 5 limitation, the plenum limitation.

09:48 6 And what Dr. Ortega did for that
09:48 7 limitation, it requires a plenum at the bottom of the
09:48 8 tank; and that has to be adapted to dispense the
09:48 9 dielectric fluid in the tank substantially uniformly
09:48 10 upwardly through each appliance slot.

09:48 11 The first thing that Dr. Ortega did was
09:48 12 to look at the design of the tank, the thing they're
09:48 13 pointing to is the plenum. One part of it has a bunch
09:48 14 of holes in it and it's designed to send the fluid
09:48 15 where things are hottest and need to be cooled the
09:48 16 most.

09:48 17 And he used his expertise to say this --
09:48 18 you know, this doesn't go substantially uniformly
09:48 19 upwardly. He reached that conclusion separately on the
09:48 20 plenum limitation.

09:48 21 Then he used data from the CFD analysis
09:48 22 that they challenge. Now, whether they're right, that
09:49 23 the -- his graduate student, who he trained how to do
09:49 24 CFD -- whether they're right, that that was an
09:49 25 independent expert, nontestifying expert, or whether

09:49 1 we're right, that that was his support staff, his
09:49 2 graduate student, the standard for what we had to do
09:49 3 was the same. Any of the data that Dr. Ortega relied
09:49 4 upon, reviewed and relied upon, we had to produce to
09:49 5 them. And we did that.

09:49 6 And their motion says we didn't give CAD
09:49 7 files, for example. That's flatly wrong. We can look
09:49 8 at their own expert's report at Paragraphs 132 and 52,
09:49 9 and he cites those CAD files because we produced them
09:49 10 in November.

09:49 11 They're also -- they also try to say that
09:49 12 there was cherry-picking. No. Dr. Ortega said,
09:49 13 here's -- that's a very large set of data. I want to
09:49 14 see the part that's right -- you know, he chose the
09:49 15 place he wanted to see it based on the claim language,
09:49 16 which requires the fluid to be going substantially
09:50 17 uniformly upwardly through the appliance slot.

09:50 18 That data that he relied upon, we have
09:50 19 produced to them. They never asked for additional data
09:50 20 from us in discovery. They never used this Court's
09:50 21 robust and efficient discovery dispute processes to say
09:50 22 we should have given them anything more.

09:50 23 And they're just wrong that
09:50 24 communications with support staff or nontestifying
09:50 25 experts get produced under Rule 26. They don't. The

09:50 1 thing that gets produced is what we have produced, what
09:50 2 the expert relied upon.

09:50 3 There is a case in response to the
09:50 4 argument they make in reply that I would like to call
09:50 5 the Court's attention to where the fact pattern is very
09:50 6 similar and the expert who was undisclosed was found to
09:50 7 be -- there was no exclusion of the testifying expert's
09:50 8 report. That is National Wildlife Insurance Company
09:50 9 versus Western National Life Insurance Company. It's a
09:51 10 2011 case, 2011 Westlaw 840976, from the Western
09:51 11 District of Texas on March 3rd of 2011.

09:51 12 And there is also a major goose/gander
09:51 13 violation going on here, because we haven't had a
09:51 14 privilege log or the production of any communications
09:51 15 with the support staff of any of Midas Green's experts.

09:51 16 They want to have their Dr. Lee testify
09:51 17 about claim charts that he admittedly did not prepare.
09:51 18 They want to have their damages expert Mr. O'Bryan be
09:51 19 able to rely on hearsay from his subordinates.

09:51 20 So with everything going on, there's
09:51 21 certainly no basis, no authority whatsoever, for
09:51 22 excluding the entirety of Dr. Ortega's opinions. But
09:51 23 even his opinions about the CFD that they're
09:51 24 challenging, there is no basis to exclude those, not
09:51 25 under the facts of what actually happened and not under

09:52 1 the law of what Rule 26 protects from discovery and
09:52 2 what it allows to be discoverable.

09:52 3 THE COURT: I'll be back in just a
09:52 4 second.

09:52 5 (Pause in proceedings.)

09:52 6 THE COURT: The Court is going to grant
09:52 7 the motion with respect to those paragraphs.

09:52 8 With respect to the issues that counsel
09:52 9 brought up at the end under the goose/gander standard,
09:52 10 if you have issues with what they've done, I'll
09:53 11 certainly entertain those separately.

09:53 12 Next I have the motion to exclude
09:53 13 Dr. Pokharna.

09:53 14 MS. BRANNEN: Good morning, Your Honor.

09:53 15 We are asking to control aspects of
09:53 16 Dr. Pokharna's expert report that we learned about for
09:53 17 the first time in the -- in his report itself that were
09:53 18 not in the final infringement contentions and also to
09:53 19 exclude his opinion about a system at the Temple
09:53 20 facility of my client that is admittedly inoperable
09:53 21 because they ran out of money and they never actually
09:53 22 finished installing what is accused. And so we think
09:53 23 it would not be -- it's just unreliable to convene a
09:53 24 jury, and there's no fact issue over that.

09:53 25 So to start with the new opinions that

09:53 1 were undisclosed, we set those forth in our brief, but
09:54 2 I would point out, Your Honor, this is a case where
09:54 3 they didn't even tell us they were planning to amend
09:54 4 the contentions. They didn't move to amend earlier,
09:54 5 give us any warning.

09:54 6 And so the prejudice that we are
09:54 7 complaining about is that if we had known that these
09:54 8 theories might be something Dr. Pokharna would present,
09:54 9 we would have had the ability to take fact discovery
09:54 10 and conduct our fact discovery with that in mind.

09:54 11 And it's not a simple case of just
09:54 12 getting to depose Dr. Pokharna again for an hour.
09:54 13 There are seven named inventors, six of whom are coming
09:54 14 off. There were two -- there was a corporate witness
09:54 15 for Midas Green and another witness for Midas Green
09:54 16 about their systems. There were many Rhodium
09:54 17 witnesses.

09:54 18 It's just really unfair, and it shows a
09:54 19 disrespect for the rules to have not even alerted us
09:54 20 that they wanted to amend the final infringement
09:54 21 contentions and to disclose these theories for the
09:54 22 first time there.

09:54 23 With regard to the systems that are
09:55 24 inoperable, that's just silly to have a trial about
09:55 25 that. There's no fact dispute over that, and it would

09:55 1 be a waste of judicial and party resources to do it.

09:55 2 So we would ask that that not -- you
09:55 3 know, the system was over two years ago. Our client
09:55 4 concededly ran out of money, never installed it.

09:55 5 Their expert has conceded it cannot
09:55 6 measure temperature. It's not wired in. There's just
09:55 7 nothing to present to the jury.

09:55 8 And it would be unreliable for
09:55 9 Dr. Pokharna to opine that systems in that state
09:55 10 practice any of the limitations.

09:55 11 THE COURT: A response?

09:55 12 MR. KOLEGRAFF: Yes. This is William
09:55 13 Kolegraff.

09:55 14 First of all, there's absolutely no --
09:55 15 nothing was hidden here from them. There's nothing new
09:55 16 that was put in Dr. Pokharna's report. For example,
09:55 17 this whole idea that Prime Controls, they were
09:55 18 surprised about, is, well, just very surprising.

09:56 19 Because on March 15th, 2023, we fully set
09:56 20 out to them in a supplement to Interrog 4 (sic), which
09:56 21 is Exhibit D here, the exact way that the Prime
09:56 22 Controls was set up and that Prime Controls was going
09:56 23 to be the infringing set of devices.

09:56 24 In response to our having done that
09:56 25 supplement to Rog 10, they came back in their

09:56 1 Supplement Rog 1 and said: As a result of the system
09:56 2 described in plaintiff's supplemental response to
09:56 3 Interrogatory No. 10 and accused in plaintiff's final
09:56 4 infringement contentions...

09:56 5 They admitted that what was in the final
09:56 6 infringement contentions were these Prime Control
09:56 7 devices. So there's absolutely no surprise here.

09:56 8 Also, this actually is in the
09:56 9 contentions. We don't say the name "Prime Controls"
09:56 10 with the name "Prime Controls," but it's actually set
09:56 11 out that says: The control -- from the contentions --
09:57 12 the control facility includes an automated controlling
09:57 13 with software that measures and monitors and controls
09:57 14 the pumps, dry coolers, and temperature of the fluid.

09:57 15 That's exactly what the Prime Control
09:57 16 systems does. So Prime Control has been fully set out,
09:57 17 including Exhibit E, which is a manual that we have
09:57 18 cited to, that is the exact Prime Controls manual.

09:57 19 As far as the Kelvion coolers, in the
09:57 20 contentions themselves, we lay out that there are two
09:57 21 Kelvion coolers. There's a Guntner coolers at the
09:57 22 Rockdale facilities; there's Kelvion coolers at the
09:57 23 Temple facility. And they form the second -- secondary
09:57 24 cooling facility.

09:57 25 Again, those are fully disclosed in the

09:57 1 contentions, and they were the basis for Dr. Pokharna's
09:57 2 report.

09:57 3 As far as what was installed not being
09:57 4 reliable, yes. It is true that they installed
09:57 5 significant portions of the Prime Control systems at
09:58 6 Temple, and then because they ran out of money, they
09:58 7 did delay that process.

09:58 8 However, we do know that there is
09:58 9 evidence that says that they are planning on re- --
09:58 10 turning that system on -- finishing that system and
09:58 11 turning it on later.

09:58 12 So they have substantially installed the
09:58 13 Prime Control systems. They're on the 99-yard line.
09:58 14 They just haven't flipped the actual switch.

09:58 15 The system is still adapted to -- it's
09:58 16 still capable of taking these measurements once they
09:58 17 finish and flip the switch.

09:58 18 So they also have this issue where they
09:58 19 don't believe that we have disclosed the slots, that
09:58 20 they were surprised that we have the slots.

09:58 21 Well, again, if you look through the --
09:58 22 our opposition, we put pictures of the slots in the
09:58 23 first amended complaint. We had -- in our supplement
09:58 24 to No. 4, we actually had a picture of the tape with
09:58 25 red lines showing where the slots were.

09:59 1 There's absolutely no surprise whatsoever
09:59 2 to anything in the -- Dr. Pokharna's report.

09:59 3 THE COURT: I'll be back in just a
09:59 4 second.

09:59 5 (Pause in proceedings.)

10:00 6 THE COURT: The Court grants that motion.
10:00 7 The next motion we have up is the motion
10:00 8 the exclude James Lee. I'll hear from defendants on
10:00 9 that.

10:00 10 MS. BRANNEN: Your Honor, on this motion,
10:00 11 we had two aspects of it. Sorry. For a moment, I
10:00 12 wasn't sure if you were calling on us or the other
10:00 13 counsel.

10:00 14 But the first aspect is a correction --
10:00 15 what they call a correction, but it's really an
10:00 16 addition to Dr. Lee's report that he served at the end
10:00 17 of a deposition.

10:00 18 Their position just doesn't make any
10:00 19 sense on this. They argue simultaneously that it is
10:01 20 duplicative of what was already in his report and that
10:01 21 it's necessary.

10:01 22 It can't be both. And all I know is that
10:01 23 it's too late, and we ask Your Honor to exclude it.

10:01 24 The other thing that we are focusing on
10:01 25 in this motion is the fact that Dr. Lee is their

10:01 1 rebuttal expert, not their opening expert.

10:01 2 And he gave an opinion that based on
10:01 3 charts that he did not prepare, that apparently counsel
10:01 4 prepared, as they say they had been produced in
10:01 5 discovery, he gave an opinion that Midas' products
10:01 6 practice the patents.

10:01 7 We think that opinion is unreliable. But
10:01 8 in any event, it's too late -- too late for their
10:01 9 damages expert, their opening expert to have relied
10:01 10 upon it.

10:01 11 And that's basically about it for that
10:01 12 opinion. It's not plausible, and it also is too late
10:01 13 for the purposes they want to use it for in the case.

10:02 14 THE COURT: Who's going to respond to
10:02 15 this?

10:02 16 MR. THOMAS: Joseph Thomas.

10:02 17 THE COURT: Is there any reason why -- I
10:02 18 think I've gone over this -- why this couldn't be taken
10:02 19 care of by just allowing this gentleman to be deposed
10:02 20 now?

10:02 21 I'm asking you, Counsel.

10:02 22 MR. THOMAS: You're asking Mr. Thomas?

10:02 23 THE COURT: I'm asking you. I'm asking
10:02 24 you. I don't know how to make it any clearer. I'm
10:02 25 asking you to respond.

10:02 1 MR. THOMAS: The -- Mr. Thomas. Yes.

10:02 2 THE COURT: Yes.

10:02 3 MR. THOMAS: We're happy to let him be
10:02 4 deposed again if they want to. We don't think they
10:02 5 need to. They had his --

10:02 6 THE COURT: Well, I'm -- stop while
10:02 7 you're ahead. I'm going to allow them -- I'm going to
10:02 8 deny the motion and allow them to depose the witness.

10:02 9 Now, going back to Mr. -- or
10:02 10 Dr. Pokharna. Is he your only infringement expert?

10:03 11 MR. THOMAS: Yes.

10:03 12 THE COURT: So what I'm going to do is --
10:03 13 it will obviously impact the trial setting, but I'm
10:03 14 going to allow you to amend his report, see if you can
10:03 15 fix it. And you all will need to get together with
10:03 16 opposing counsel and figure out how long you think
10:03 17 it'll take for Dr. Pokharna to address any of the
10:03 18 issues that you think would make his opinion survive a
10:03 19 future challenge.

10:03 20 And then y'all can set up a schedule to
10:03 21 figure out how to deal with that in terms of rebuttal
10:03 22 reports and all that. So I'm going to allow him to
10:03 23 amend his report.

10:03 24 Next up I have the motion to exclude -- I
10:03 25 don't know if it's a doctor or not. I don't think it

10:03 1 is -- Duross O'Bryan. This is the defendants' motion.

10:04 2 MS. BRANNEN: Thank you, Your Honor.

10:04 3 THE COURT: This one -- this one has both
10:04 4 lost profits and a reasonable royalty analysis.

10:04 5 MS. BRANNEN: That's correct.

10:04 6 Is my screen successfully sharing? We
10:04 7 prepared a few slides on this one.

10:04 8 Midas' damages opinion -- damages expert
10:04 9 makes four main errors that we believe are substantial
10:04 10 and not just matters that we should have to cross them
10:04 11 on, Your Honor. The first error pervades both his lost
10:04 12 profits and his reasonable royalty damages.

10:08 13 (Clarification by Reporter.)

10:08 14 (Recess taken.)

10:08 15 THE COURT: Let's go back on the record.

10:08 16 MS. BRANNEN: Thank you, Your Honor.

10:08 17 This is Elizabeth Brannen, addressing the motion to
10:08 18 exclude Midas' damages expert, Mr. O'Bryan.

10:08 19 The first error he made pervades his lost
10:08 20 profits and reasonable royalty opinions, both of them.
10:08 21 And he basically doubles his damages number by assuming
10:08 22 that Rhodium would continue infringing for almost three
10:09 23 years past trial, even if there's a jury verdict of
10:09 24 infringement.

10:09 25 Now, the patent -- he's -- the patent

10:09 1 doesn't expire till something like 2035. He's not
10:09 2 giving an opinion about a fully paid-up license. This
10:09 3 is something different going on. He's saying he has
10:09 4 the ability to award damages after trial based on
10:09 5 speculation that my client would continue to infringe.
10:09 6 And there's just no basis for that. Certainly no
10:09 7 reliable basis.

10:09 8 If we look at the basis he said he had --
10:09 9 I'll try sharing my screen here to put some of this --
10:09 10 make some of this visible -- he's relying only on a
10:09 11 single projection, and that projection is something
10:09 12 that Rhodium filed in connection with a potential
10:09 13 merger transaction. And that document just says that
10:09 14 Midas -- that Rhodium -- excuse me -- plans to expand
10:09 15 its operations to full capacity if the merger goes
10:10 16 through.

10:10 17 Well, two problems. First of all,
10:10 18 expanding your operations doesn't say anything about
10:10 19 whether you would continue infringing or ignore an
10:10 20 infringing verdict. And even more importantly, that
10:10 21 merger never happened. It was canceled. And
10:10 22 Mr. O'Bryan omitted the -- didn't take into account the
10:10 23 fact that he just assumed that --

10:10 24 THE COURT: Let me interrupt you and hear
10:10 25 a response to that argument.

10:10 1 MR. THOMAS: Your Honor, the
10:10 2 representations made in that S-1 were for a merger that
10:10 3 was canceled, but the representations were not
10:10 4 conditional. They did not say, If we get the merger,
10:10 5 we'll do this expansion. They just said that our
10:10 6 business plan is to expand.

10:10 7 That's what they told their investors.
10:10 8 They had existing investors and the prospective new
10:10 9 investors through the merger. So those representations
10:11 10 are from Rhodium of their own expansion plans, which
10:11 11 are reasonable for Mr. O'Bryan to rely upon.

10:11 12 THE COURT: Did he or did he not rely on
10:11 13 that merger when he -- when he comes in and he says,
10:11 14 This is what I did. I looked and there's this document
10:11 15 that shows there's going to be a merger and -- to rely
10:11 16 on and the merger didn't happen, is that what he's
10:11 17 going to say?

10:11 18 MR. THOMAS: No. He's going to say these
10:11 19 are representations that they issued that were not
10:11 20 conditioned upon the merger. They were made in the
10:11 21 public forum. And I'm going to rely on their
10:11 22 representations to their investors that they had a
10:11 23 plan -- they have a plan to expand.

10:11 24 THE COURT: Okay. Is there anything else
10:11 25 you'd like to say with respect to the lost profits

10:11 1 argument that the defendant is making?

10:11 2 MR. THOMAS: Yes, Your Honor. The lost
10:11 3 profit analysis was done correctly. It was based on
10:12 4 information that was available to the experts. Both
10:12 5 sides' experts have acknowledged there are no licenses.
10:12 6 This is relatively brand-new technology in this field.
10:12 7 This immersion cooling technology hasn't been licensed.

10:12 8 Mr. O'Bryan properly used the sales of
10:12 9 the product as a basis, and there's good case law we
10:12 10 cited for him to rely upon the sales as a basis to
10:12 11 determine the reasonable royalty, and the profits from
10:12 12 those sales to support that reasonable royalty
10:12 13 analysis.

10:12 14 THE COURT: Would you give me an example?

10:12 15 MR. THOMAS: Yes. They -- they -- our
10:12 16 deadlines made a significant sale to a company known as
10:12 17 RITE. It's a public company. It's one of the largest
10:12 18 bitcoin mining companies in the -- North America, if
10:12 19 not the U.S. -- if not nationally -- internationally.

10:12 20 And those sales occurred well within
10:13 21 months or within a year or so of the time that the
10:13 22 license would have been negotiated. And under the Book
10:13 23 of Wisdom, Mr. O'Bryan used those sales to forecast
10:13 24 what the expected profits would be of my client in
10:13 25 terms of making assumption on how to --

10:13 1 THE COURT: How does the Book of Wisdom,
10:13 2 what does that have to do with lost profits?

10:13 3 MR. THOMAS: Well, the lost -- we believe
10:13 4 that the sale of the --

10:13 5 THE COURT: No, no. What does the book
10:13 6 of profits -- what does that have to do with lost
10:13 7 profits? I don't understand.

10:13 8 MR. THOMAS: Well, the -- we believe that
10:13 9 the case law allows Mr. O'Bryan --

10:14 10 THE COURT: Tell me any case that
10:14 11 discusses the Book of Wisdom in a context of lost
10:14 12 profits.

10:14 13 MR. THOMAS: Okay. Well, Your Honor, we
10:14 14 don't need the Book of Wisdom. Rhodium installed
10:14 15 200 megawatts. He's using their actual installation as
10:14 16 the basis to determine a sale that would have been made
10:14 17 by my client to Rhodium of those products. And using
10:14 18 those -- that sales information, he projected his lost
10:14 19 profits.

10:14 20 THE COURT: Okay. I'll be back in just a
10:14 21 second.

10:14 22 (Pause in proceedings.)

10:15 23 THE COURT: This question is for -- sorry
10:15 24 for all the coughing -- either party, but I'll start
10:15 25 with the party that is moving for this, the defendant.

10:15 1 What specific paragraphs in his -- in the
10:16 2 report are you asking me to strike on lost profits?
10:16 3 Can you articulate those into the record?

10:16 4 MS. BRANNEN: Your Honor, I would need a
10:16 5 moment to pull it up and articulate them into the
10:16 6 record, but we're asking to strike his entire lost
10:16 7 profits opinion, because he has no basis --

10:16 8 THE COURT: Is it -- I'm sorry. Is it
10:16 9 divided up, lost profits -- I'm making this up --
10:16 10 Page 1 through 10, reasonable royalty, 11 through 20.
10:16 11 Is it -- is it that clean?

10:16 12 MS. BRANNEN: I believe it's fairly
10:16 13 clean. Let me show my screen to give an example of one
10:16 14 page. Let me see if I can do it.

10:16 15 So here's an example of a table in his
10:16 16 report. And he's very clear at the top about what his
10:16 17 reasonable royalty number is. And then underneath
10:16 18 that, he's clear -- he's got a separate line item for
10:16 19 what his lost profits opinion is. And so the report is
10:16 20 well organized in the sense that his lost profits
10:16 21 opinions are coherent. And I apologize that I don't
10:17 22 know exactly those, but if we take a short break, I
10:17 23 can --

10:17 24 THE COURT: Here's what I'm going to do.
10:17 25 We've gone over -- I'm going to grant the motion with

10:17 1 respect to lost profits. Same deal. If the
10:17 2 defendant -- I'm sorry -- the plaintiff wants to have
10:17 3 their expert redo the lost profits and try and go
10:17 4 again, that's fine. You all need to figure out how to
10:17 5 do the schedule.

10:17 6 I'm going to deny the motion with respect
10:17 7 to the -- his reasonable royalty calculations.

10:17 8 Next up, I have the motion for summary
10:17 9 judgment of noninfringement. I'll hear from the
10:17 10 defendant on that, please.

10:17 11 MS. BRANNEN: Thank you, Your Honor.

10:17 12 May I clarify the Court's ruling on
10:17 13 Mr. O'Bryan? The posttrial damages period that he has
10:17 14 is in his lost profits, but it also pervades his
10:18 15 reasonable royalty. Is there a separate ruling on the
10:18 16 aspect of damages --

10:18 17 THE COURT: So I usually don't have a
10:18 18 problem with the jury answering future reasonable
10:18 19 royalty, because then at least we have a reasonable
10:18 20 royalty rate. And if the plaintiff is successful, then
10:18 21 the jury will have spoken as to the reasonable royalty
10:18 22 rate, which is probably what I would consider applying
10:18 23 on damages going forward, if you continued to make
10:18 24 sales.

10:18 25 And they're not going to get those

10:18 1 damages, future damages, unless you -- the sales were
10:18 2 actually made. And the way I've done it in the past,
10:18 3 both as a lawyer and as a judge, is let's say plaintiff
10:18 4 wins. Reasonable royalty rate -- I'll make up
10:18 5 something -- 5 percent. I would allow you -- allow the
10:18 6 defendant to continue to sell and -- but they would
10:18 7 have to put into the registry of the Court the
10:19 8 6 percent. If you stopped selling, there would be no
10:19 9 future damages under a reasonable royalty deal. Does
10:19 10 that sound -- is that what you were asking me?

10:19 11 MS. BRANNEN: Thank you, Your Honor.
10:19 12 Yes. I think it clarifies it. In other words, as I
10:19 13 understand it, lost profits, they've got to completely
10:19 14 redo it if they want to try to get it in.

15 THE COURT: Correct.

10:19 16 MS. BRANNEN: Reasonable royalty, they --

10:19 17 THE COURT: And I'll say right now, lost
10:19 18 profits -- is there -- let me ask the plaintiffs: Is
10:19 19 there no request for an injunction here?

10:19 20 MR. THOMAS: No. No, Your Honor. There
10:19 21 isn't.

10:19 22 THE COURT: Okay. Is there a reason
10:19 23 there's not a request for injunction?

10:19 24 MR. THOMAS: I'm sorry. I misspoke.
10:19 25 There is a request for an injunction.

10:19 1 THE COURT: Okay. So generally speaking
10:19 2 again, what I will do is, with regard -- if it's a lost
10:19 3 profits, I probably will have to -- I probably won't
10:19 4 give them a question on future lost profits, but again,
10:20 5 and this is because we don't know whether there'd be
10:20 6 any, I will take up the injunction question because you
10:20 7 all, I assume, are competitors or you wouldn't have
10:20 8 lost profits.

10:20 9 And so but I will -- so don't anticipate
10:20 10 getting a lost profits question going forward, but if
10:20 11 you can redo it and you think you can get past a
10:20 12 Daubert challenge, I'll do it for both prior. And then
10:20 13 if -- again, only if the plaintiff wins, if the
10:20 14 defendant comes in and says, No, you shouldn't give an
10:20 15 injunction, well, then we'll have to figure out a way
10:20 16 to be fair to the plaintiff to make sure how we assess
10:20 17 damages going forward. And I'll take care of that.

10:20 18 So did I make it clearer or less clear on
10:20 19 what I just said for everyone? I'm happy to answer any
10:20 20 questions that you have.

10:20 21 MS. BRANNEN: Your Honor, this is
10:20 22 Elizabeth Brannen for Rhodium. Just I think it's clear
10:21 23 with respect to the original question I was asking.

10:21 24 So for their reasonable royalty, they're
10:21 25 not going to get a damages award past trial

10:21 1 automatically, they have to present what it is through
10:21 2 trial and then they can get a separate ruling on if
10:21 3 Rhodium were to continue to infringe, what could the
10:21 4 reasonable royalty be after that. Have I --

10:21 5 THE COURT: Right. And I've seen it
10:21 6 handled two ways, and I would let you all argue what's
10:21 7 fair. I've seen it where the jury's given an amount --
10:21 8 I'm making this up again -- 5 percent. And so you give
10:21 9 the 5 percent. This is where the Book of Wisdom does
10:21 10 come in. You know, they will have figured that out.

10:21 11 But I've also seen judges who have
10:21 12 considered giving a slightly higher, going forward,
10:21 13 because it's now -- the jury's now found infringement.
10:21 14 So but they're -- I'm not going to award -- now, I
10:21 15 didn't hear anyone talk about a lump sum. If there is
10:21 16 a lump-sum award that goes through the end of the --
10:22 17 that would go through the end of the patent, whenever
10:22 18 that is, which is a period going forward, but
10:22 19 obviously, it's an amount that neither of y'all have
10:22 20 done yet and that someone would say, as opposed to
10:22 21 reasonable royalty, we would take -- the plaintiff
10:22 22 would have taken a lump sum of X and y'all would have
10:22 23 paid a lump sum of X and -- y'all have -- but y'all
10:22 24 haven't done that. So that's not an issue here.

10:22 25 So as far as I can tell, from the way the

1 plaintiffs have structured their damages model, they
2 won't be getting future damages until we see if they
3 win and what I do on the injunction, and then if there
4 is not an injunction and you all do continue to sell
5 what the jury has determined to be infringing, I'll
6 make sure we come up with some way of making sure the
7 plaintiff is protected financially.

8 Anything else?

9 MS. BRANNEN: Just I would like to
10 clarify, my client is not a competitor of Midas Green,
11 not even allegedly. And that's part of why they have
12 such a trouble of meeting the lost profits standard.

13 THE COURT: Well, then they're going to
14 have a really tough time getting an injunction.

15 MS. BRANNEN: I don't even believe
16 there's a live injunction request, Your Honor. That
17 was news to me. I do not think they've preserved it.
18 I certainly don't think they have --

19 THE COURT: Well, they've told me there's
20 an injunction request. Maybe there is; maybe there
21 isn't. I don't know.

22 MS. BRANNEN: Thank you.

23 THE COURT: I'm up with the law, that
24 they only get one if y'all are competitors. And I
25 don't know -- I'll know much better after trial whether

10:23 1 or not I think you're competitors.

10:23 2 MR. THOMAS: Your Honor, that is a
10:23 3 disputed issue in this case. We contend, Your Honor,
10:23 4 we are competitors.

10:23 5 THE COURT: Well, I have no way of
10:23 6 knowing which of you is right.

10:23 7 So next up we have the motion for summary
10:23 8 judgment of noninfringement. I'll take that up.

10:23 9 MS. BRANNEN: Thank you, Your Honor.

10:23 10 So the technology at issue involves
10:24 11 systems for pooling bitcoin miners. The computers that
10:24 12 do the mining get very hot when they're mining bitcoin.

10:24 13 And in particular, the patent and the
10:24 14 accused systems -- and you can see a picture -- some of
10:24 15 the accused systems, they relate to their immersion
10:24 16 cooling systems. Meaning, there are miners that get
10:24 17 immersed in dielectric fluid. It doesn't conduct
10:24 18 electricity. And as the liquid is circulated through
10:24 19 the system, it removes heat from the miners.

10:24 20 We believe a lot of limitations are
10:24 21 missing, but we focused our motion on a single claim
10:24 22 limitation. And we believe it's the rare case where
10:24 23 Midas doesn't have any evidence that Rhodium uses
10:24 24 anything like this limitation that's shown here.

10:24 25 And it requires the system to have a

10:24 1 control facility, and that control facility has to be
10:24 2 adapted to coordinate the operation of two different
10:25 3 fluid circulation facilities, a primary facility and a
10:25 4 secondary facility.

10:25 5 And it has to be adapted to coordinate
10:25 6 their operation based on this recited variable as a
10:25 7 function of the temperature of the dielectric fluid in
10:25 8 the tank containing the bitcoin miners.

10:25 9 And we don't -- basically, for the
10:25 10 primary fluid circulation facility, you can think of
10:25 11 that as the pipes and pumps. That's what they say it
10:25 12 is. We may take issue with that at trial, but not for
10:25 13 purposes of this motion.

10:25 14 Similarly, for the secondary fluid
10:25 15 circulation facility, they point to these large coolers
10:25 16 that have fans in them. So you can think of the
10:25 17 primary as pumps and pipes; secondary, they say it's
10:25 18 the fans and the dry coolers.

10:25 19 And we pointed out in our motion that we
10:25 20 don't take the temperature of the fluid in the tank,
10:26 21 and we don't use it for anything, let alone to
10:26 22 coordinate either of those facilities, those fluid
10:26 23 circulation facilities.

10:26 24 Reading their opposition, you could be
10:26 25 forgiven for assuming that I'd be standing in front of

10:26 1 you asking for a very narrow special construction of
10:26 2 this term, but that's not what we're doing.

10:26 3 Our motion, we construed nothing. We
10:26 4 agree that this term gets its plain meaning, and we
10:26 5 don't have this limitation or anything like it.

10:26 6 And so in our motion, we went through all
10:26 7 the various theories their expert had put forth, some
10:26 8 of which have been addressed in the motion to exclude
10:26 9 Dr. Pokharna, where the opinions weren't in their final
10:26 10 infringement contentions.

10:26 11 But we went through all the various
10:26 12 theories of why they said this limitation was present,
10:26 13 and we debunked each of them. And we showed why the
10:26 14 limitation isn't there literally and why, in those
10:26 15 instances when he had offered an opinion under the
10:26 16 doctrine of equivalents, there was no -- nothing in the
10:27 17 report, no evidence that could satisfy that standard
10:27 18 for insubstantial differences for same
10:27 19 function-way-result.

10:27 20 So the first thing I'd like to hopefully
10:27 21 establish in this motion is that based on the DMM
10:27 22 Specialities case, which we cite in our reply at Page 2
10:27 23 and also just common sense, their opposition makes no
10:27 24 attempt whatsoever to defend or salvage any of
10:27 25 Dr. Pokharna's theories under the doctrine of

10:27 1 equivalents.

10:27 2 You can scour their opposition. The word
10:27 3 "equivalent" isn't there. "Equivalents" isn't there.
10:27 4 "DOE" isn't there. "Insubstantial" or "substantial
10:27 5 differences," it's just not discussed. They have
10:27 6 waived this.

10:27 7 And I'm happy also to go through each of
10:27 8 the things that they have -- all the various theories
10:27 9 they pointed to and show why there is a failure under
10:27 10 the plain meaning of this limitation to show that we
10:27 11 have anything like it.

10:28 12 But the first system that they accuse are
10:28 13 the Prime Controls and Kelvion sensors. Those are the
10:28 14 ones that are admittedly inoperable that I believe have
10:28 15 been excluded in connection with Dr. Pokharna's report.

10:28 16 And I don't think this is fixable, Your
10:28 17 Honor. There is no -- there's attorney argument, and
10:28 18 we heard some of the attorney argument from
10:28 19 Mr. Kolegraff.

10:28 20 But this is a system where most of the
10:28 21 sensors are missing and none of the sensors they're
10:28 22 pointing to is wired in. And perhaps more importantly,
10:28 23 their expert, you can see the interrogatory response
10:28 24 they cite to in their opposition at Page 13, saying:
10:28 25 Even where a sensor is connected, it is not wired in.

10:28 1 Their expert, Dr. Pokharna, conceded that
10:28 2 in its present state, this system cannot measure
10:28 3 temperature.

10:28 4 Now, even if this was operational, they
10:29 5 haven't explained what they believe the plain meaning
10:29 6 of this limitation is or why what this system was
10:29 7 designed to measure would actually be adapted to
10:29 8 coordinate both control facilities.

10:29 9 And so that's also another problem with
10:29 10 this whole theory, that you can see up here the
10:29 11 sensors, where they would go, are in an entirely
10:29 12 different building and they have a little sign they
10:29 13 have labeled -- their own expert has labeled that the
10:29 14 building containing the tanks with the miners is in a
10:29 15 completely different place.

10:29 16 This wouldn't be the variable they need
10:29 17 to show that we're using, and they also can't show that
10:29 18 it would be adapted to coordinate both fluid
10:29 19 circulation facilities.

10:29 20 The only evidence they give is shown
10:29 21 here, that it would be adapted to adjust the fan speed.
10:29 22 Well, that's what they say is the secondary circulation
10:29 23 facility. In order to survive summary judgment, they
10:29 24 should have to present evidence and explain how that
10:30 25 evidence could lead a reasonable juror to believe that

10:30 1 the claim language is satisfied with respect to both
10:30 2 circulation facilities and being adapted to coordinate
10:30 3 the operation of both of them. And they just can't do
10:30 4 that for the main thing that they spent the most time
10:30 5 on in their brief, which is this Prime Controls and
10:30 6 Kelvion coolers.

10:30 7 And by the way, they briefed those
10:30 8 separately, but Prime Controls and other vendors were
10:30 9 hired to build the monitoring system for the Kelvion
10:30 10 cooler. So even though they talk about the Prime
10:30 11 Control system and then they talk about the Kelvion
10:30 12 coolers, you can see, for example, from their brief at
10:30 13 Page 18, the thing they're citing to for the Kelvion
10:30 14 coolers as evidence that those infringe, that's all
10:30 15 design documents of Prime Controls. That was
10:30 16 admittedly never installed and is admittedly
10:30 17 inoperable, cannot measure any temperature.

10:30 18 So at the last page of their brief, they
10:30 19 give a couple throwaways to try to defend a theory of
10:31 20 infringement based on the Guntner coolers. These are
10:31 21 shown here. These are only at Rhodium's Rockdale
10:31 22 facility.

10:31 23 And again, the tanks containing the
10:31 24 miners are in one place, and the coolers they're
10:31 25 pointing to are outside the building. And what their

10:31 1 theory is here is that Rhodium measures the temperature
10:31 2 of the fluid after it comes out of the cooler.

10:31 3 Well, that obviously is not literally the
10:31 4 same thing as the fluid in the tanks nor is it even
10:31 5 arguably insubstantially different.

10:31 6 And they also -- for this one too, all
10:31 7 they say is that we might use it to adjust the fan
10:31 8 speed in these coolers. There's no evidence they can
10:31 9 point the Court to of how this is in any way adapted to
10:31 10 coordinate the operation of what they've pointed to as
10:31 11 the primary fluid circulation facility, the pumps and
10:31 12 the pipes.

10:31 13 So it's deficient in multiple respects.
10:31 14 And the single paragraph in their opposition that's
10:32 15 dedicated to try to revive this doesn't answer the
10:32 16 question of how this is using the right variable in any
10:32 17 way, let alone using any variable to control both fluid
10:32 18 circulation facilities. They only talk about fans.

10:32 19 Then the final thing that they also try
10:32 20 to revive is the fact that in both facilities, Temple
10:32 21 and Rockdale, Rhodium can measure the temperature of
10:32 22 the chips in the miners and the printed circuit boards
10:32 23 in the miners.

10:32 24 Their expert, though -- obviously
10:32 25 measuring a chip temperature or a board temperature is

10:32 1 not measuring the temperature of the tank fluid. And
10:32 2 their expert admitted those are different. So there's
10:32 3 no literal infringement. There's no analysis of why it
10:32 4 would be insubstantially different.

10:32 5 And again, here too, all they say with
10:32 6 PCB temperature is that we can monitor it. All they
10:32 7 say with chip temperature is that we can shut off the
10:33 8 miner or reduce power to the miner.

10:33 9 But what they haven't said is what
10:33 10 evidence is there anywhere in the record that we could
10:33 11 use either the chip or PCB temperature to coordinate
10:33 12 the operation of the pumps and pipes or of the fans,
10:33 13 which they say are the primary and the secondary
10:33 14 circulation facilities.

10:33 15 There is no evidence. It's a rare case
10:33 16 where none of their theories even make sense. And we
10:33 17 hope they should have to articulate one that we can at
10:33 18 least understand what this jury is going to be asked to
10:33 19 decide before they would be allowed to proceed.

10:33 20 THE COURT: A response?

10:33 21 MR. KOLEGRAFF: Yes. So as -- there are
10:33 22 just a lot of triable issues of material fact here.
10:33 23 And what Rhodium has done to try to eliminate those
10:33 24 facts is they've taken a very unusual reading -- a
10:33 25 plain reading of Claim 1.

10:33 1 And what they're trying to say is that
10:33 2 you have to have your temperature sensor in the tank to
10:33 3 take the temperature of the fluid.

10:34 4 Their entire motion is based upon that
10:34 5 premise, that they have to require a sensor in the tank
10:34 6 taking the temperature of the fluid. But the claim
10:34 7 just doesn't say that.

10:34 8 Now, this is extremely important to it.
10:34 9 On Page 2 of their motion, they say: In other words,
10:34 10 to infringe Midas' asserted claims, a cooling system
10:34 11 must take advantage of the dielectric fluid while it
10:34 12 is -- must take the temperature while it is in the
10:34 13 tank.

10:34 14 They say the same thing on Page 4:
10:34 15 Neither of the tanks have a fluid temperature in the
10:34 16 tank.

10:34 17 This is repeated throughout their motion.
10:34 18 That is the basis for this entire motion, is that there
10:34 19 has to be a temperature sensor inside the tank in order
10:34 20 to take the temperature.

10:34 21 If we look at Claim 1 and parse it, it
10:34 22 talks about: A control facility adapted to coordinate
10:34 23 the operation of the primary and secondary fluid
10:35 24 circulation facilities as a function of the temperature
10:35 25 of the dielectric fluid in the tank.

10:35 1 That plain reading does not say where a
10:35 2 temperature sensor has to be. It certainly doesn't
10:35 3 place it in the tank. It certainly doesn't even say
10:35 4 you have to take the measurement of the fluid itself.

10:35 5 All you have to do is collect enough
10:35 6 information so that you can coordinate the operation of
10:35 7 the two circulation facilities.

10:35 8 So here you can have that sensor -- that
10:35 9 temperature sensor, you could have it in the tank. You
10:35 10 don't have to. But you could have it on the pipe
10:35 11 leading out of the tank. You could have it on the
10:35 12 inlet pipe to the tank. You could have it further down
10:35 13 towards the coolers.

10:35 14 Every one of those data points, every one
10:35 15 of those points, is going to give you sufficient data
10:35 16 in order to make decisions on how you want to run your
10:35 17 pumps and fans.

10:35 18 For example, we are talking about the
10:35 19 Guntner coolers, which are the coolers that sit out in
10:35 20 the -- outside the building, there, we are measuring
10:36 21 the fluid temperature that comes out of the cooler.

10:36 22 That is the exact same temperature as is
10:36 23 going into the tank. So we are measuring the
10:36 24 temperature of the fluid in the tank, and we adjust the
10:36 25 fan speeds of that Guntner -- excuse me -- Rhodium

10:36 1 adjusts the fan speeds of the Guntner cooler to make
10:36 2 sure that that inlet temperature to the tank remains
10:36 3 very constant.

10:36 4 We know for a fact that the claim does
10:36 5 not require that the temperature sensor be in the tank,
10:36 6 and we know it for at least a couple of reasons.

10:36 7 First of all, if we look at Figure 13 of
10:36 8 the patent, there are sensors that are shown not only
10:36 9 in the reservoir, which is separate from the tank, but
10:36 10 the temperature sensors are also shown in the fluid
10:36 11 pipes and shown in the fluid pipes of the primary
10:36 12 circulation facility and shown as the temperature
10:37 13 sensors in the secondary facility.

10:37 14 So even the embodiments that we have in
10:37 15 the patent do not show the sensor in the tank.

10:37 16 It's also shown in Figures 4 and 12 where
10:37 17 you have the tank, which is numbered 14, the tank 14
10:37 18 does not have a sensor in it. The only sensor is in
10:37 19 the recovery reservoir, which is No. 42. So again,
10:37 20 even the embodiments that we have in the patent do not
10:37 21 require that the sensor be in the tank.

10:37 22 So let's talk a little bit about Prime
10:37 23 Controls. Prime Controls is a very sophisticated
10:37 24 control system that has no other purpose in life but to
10:37 25 control and manage the system at the Temple facility.

10:37 1 There are temperature sensors, there are pump controls,
10:37 2 there are reporting facilities. They spent millions of
10:37 3 dollars putting this thing in, and it has no
10:37 4 noninfringing functionality.

10:37 5 Again, if you look at Exhibit G of our
10:38 6 opposition, you can see that they have the layout of
10:38 7 the complete system, the entire plumbing and design
10:38 8 system. H shows a picture of the Kelvion and Temple
10:38 9 coolers that have the temperature sensors installed.
10:38 10 They're already there in the pipes.

10:38 11 They talked about saddles being
10:38 12 installed. They purchased saddles to put on those
10:38 13 pipes so they can make the finishing of the
10:38 14 installation even easier.

10:38 15 If you look at Exhibit I, there is an
10:38 16 issued-for-approval manual on how this whole system is
10:38 17 supposed to be put together, this Prime Control system,
10:38 18 and it shows all of these things working and in
10:38 19 operation. So it's almost fully installed. They just
10:38 20 haven't flipped the final switch.

10:38 21 And let's -- we're going to suggest here,
10:38 22 is that they have just not turned on that switch
10:39 23 because of this litigation. As soon as this litigation
10:39 24 is over, you know, they're very likely to turn this
10:39 25 thing back on because, again, they've got a million

10:39 1 dollars of sunk costs, that they're going to need to
10:39 2 turn on. And we have an e-mail, this is from a Depo
10:39 3 Exhibit 77, that says: Our plan -- and that's
10:39 4 referring to Rhodium -- Our plan is to get Prime
10:39 5 Controls paid back and then have Prime Controls finish
10:39 6 the rest of the work on the site.

10:39 7 So that is a huge issue of fact, whether
10:39 8 or not Rhodium is going to reactivate or activate this
10:39 9 Prime Controls when this litigation is over.

10:39 10 Also, so -- also, how much work they have
10:39 11 left to do is also a huge issue of fact as it goes to
10:39 12 Prime Controls.

10:39 13 As far as any waiver, we've waved
10:39 14 nothing. We attached the entire report of
10:40 15 Dr. Pokharna, where he goes not only through literal
10:40 16 infringement, he goes through doctrine of equivalents
10:40 17 infringement on all of these issues.

10:40 18 As far as the Kelvion systems at Temple,
10:40 19 that really reduces down to the same arguments we were
10:40 20 just talking about with Prime Controls. That is, the
10:40 21 temperature sensors are there. The computers are in
10:40 22 place. It's basically all set to go, they just have to
10:40 23 finish wiring it up and then they're going to be able
10:40 24 to control the Kelvion coolers based upon the
10:40 25 temperature of the coolant.

10:40 1 At Guntner, which is at the Rockdale
10:40 2 facility, that we do know is in operation. They
10:40 3 actually have the Guntner coolers that sense the
10:40 4 temperature of the fluid as it's exiting the Guntner
10:40 5 coolers. And based upon that temperature, they adjust
10:40 6 the fan speed. This is in the Guntner motor managing
10:40 7 manual.

10:40 8 They adjust the speed of the fans to keep
10:40 9 that outlook temperature the same. That outlook
10:40 10 temperature fluid is the temperature of the fluid as
10:41 11 it's going into the tank.

10:41 12 Finally, we get to the Restful API, which
10:41 13 is this idea that we're checking the temperature of the
10:41 14 fluid in the tank by using functionality built into the
10:41 15 miners. These miners, which are just very
10:41 16 sophisticated computers, actually have a couple
10:41 17 different sets of temperature gauges, sensors inside of
10:41 18 the miners. One of those is to measure the temperature
10:41 19 of the PCB board, the printed circuit board. And the
10:41 20 printed circuit board is what's setting up against the
10:41 21 fluid. So that is measuring the temperature of the
10:41 22 fluid.

10:41 23 And based upon that, the system
10:41 24 automatically puts more power on to the miner, if it
10:41 25 can handle warming the fluid similar. If the fluid is

10:41 1 too warm, then it actually powers down the miner; it
10:41 2 has the miner generate less power. That way it adjusts
10:41 3 the amount of heat that is injected into the system,
10:41 4 which is controlling the circulation of both the
10:42 5 primary and the secondary circulation facilities.

10:42 6 So here we just have a lot of issues of
10:42 7 fact as to whether or not Prime Controls is going to be
10:42 8 actually finished. We've got questions of fact as to
10:42 9 how the Guntner is actually managing the fan speed to
10:42 10 control the temperature of the tank; and really, all
10:42 11 gets down to their assertion that the temperature probe
10:42 12 has to be in the tank, which is just not the plain
10:42 13 meaning of this claim.

10:42 14 So with that, I'll turn it back.

10:42 15 MS. BRANNEN: May I respond?

10:42 16 THE COURT: Rebuttal?

10:42 17 Please.

10:42 18 MS. BRANNEN: Thank you.

10:42 19 So I'll try to make five or fewer points.

10:42 20 First, I want to talk about what we did not hear.

10:42 21 Normally, to oppose summary judgment where we would --

10:42 22 you would hear the plaintiff saying, This is what I

10:42 23 think the plain meaning of this limitation is, and this

10:43 24 is the evidence I'm pointing you to, Judge, where a

10:43 25 reasonable jury could find that the temperature of the

10:43 1 fluid in the tank is part of the -- is adapted to
10:43 2 control both of these variables.

10:43 3 We've never heard that.

10:43 4 We've heard them saying that I'm asking
10:43 5 you to give an overly narrow claim construction. I'm
10:43 6 not. But they need to be doing something. If they're
10:43 7 not measuring it with a sensor in the tank, they need
10:43 8 to be explaining what evidence there is that we do
10:43 9 anything like using that temperature of the fluid in
10:43 10 the tank to coordinate the operation -- to be adapted
10:43 11 to coordinate the operation of two different control
10:43 12 facilities.

10:43 13 And I didn't hear counsel give an
10:43 14 explanation of what that limitation means or what
10:43 15 evidence satisfies it.

10:43 16 With respect to Prime Controls -- and
10:43 17 this applies to Prime Controls and the Kelvion coolers
10:43 18 where they were going to install sensors but never did.
10:43 19 The most -- this is where we heard counsel try to point
10:43 20 to evidence, but he points to some unidentified
10:44 21 deposition testimony that I'm not sure was even in the
10:44 22 opposition brief, and is from several years ago, I
10:44 23 believe, saying that at one point Rhodium planned to
10:44 24 have Prime Controls finish its work.

10:44 25 That is of no moment now.

10:44 1 If we're going to have a trial now, we
10:44 2 can't have an advisory opinion about a system that
10:44 3 isn't in place. And that would -- even if we could,
10:44 4 that would be an enormous waste of resources. We need
10:44 5 to have a trial over the system as it exists now. And
10:44 6 Mr. Kolegraff is not pointing to any evidence that all
10:44 7 Rhodium needs to do is turn on the switch. The
10:44 8 evidence is to the contrary.

10:44 9 Their own evidence that they cite to this
10:44 10 Court is that none of the sensors is wired in. Their
10:44 11 expert concedes that the system is incapable of
10:44 12 measuring temperature. We really ought not to have a
10:44 13 trial over Prime Controls and Kelvion, which may never
10:44 14 be finished, may be changed. It's not the province of
10:45 15 federal courts to have a trial over something that
10:45 16 might happen with a system in the future.

10:45 17 There also is no evidence of how these
10:45 18 sensors, which are nowhere near the tank containing the
10:45 19 bitcoin miners, if they were operational, would be used
10:45 20 to coordinate the operation of both the fans and the
10:45 21 coolers. That's what they say they would do, but how
10:45 22 would that be adapted to coordinate the operation of
10:45 23 what they say counts as the primary circulation
10:45 24 facility, the pumps and the pipes?

10:45 25 We didn't hear that. We won't hear that,

10:45 1 from them or their expert, because they have no
10:45 2 evidence of that. And they haven't tried to point Your
10:45 3 Honor to that evidence now.

10:45 4 The third point I'd like to make is about
10:45 5 Guntner. Mr. Kolegraff misstated the record. I will
10:45 6 show -- this is their opposition brief, Docket 164.
10:46 7 Near the end, I think we're at Page 21. Yeah.
10:46 8 Page 21.

10:46 9 The Guntner coolers -- which he
10:46 10 acknowledges are outside the building -- the
10:46 11 temperature sensors there sense the temperature -- I'm
10:46 12 quoting from their brief -- sense the temperature of
10:46 13 the dielectric fluid flowing out of the evaporative
10:46 14 cooler.

10:46 15 The job of that cooler is to cool. So
10:46 16 it's obviously not the same as the temperature of the
10:46 17 liquid when it's in the tank with the miners. And
10:46 18 their expert concedes as much, and they have completely
10:46 19 abandoned any effort to explain how it's
10:46 20 insubstantially different or how, under the doctrine of
10:46 21 equivalents, this theory could survive.

10:46 22 And the second thing about Guntner, all
10:46 23 they say at that page of their brief is that the sensor
10:46 24 there in that Guntner cooler is adapted to adjust the
10:46 25 cooler's fan speed. Okay. So they have evidence to

10:47 1 get to the jury on one of the two circulation
10:47 2 facilities that they need.

10:47 3 But we didn't even hear Mr. Kolegraff
10:47 4 point to any evidence about coordination of the primary
10:47 5 facility, the pumps and the pipes, because Guntner,
10:47 6 there is no evidence from which a reasonable juror
10:47 7 could conclude that this claim limitation is satisfied.

10:47 8 And finally, on Restful API, I will say,
10:47 9 we heard attorney argument, but all they're really
10:47 10 saying is that Rhodium can monitor the temperature of
10:47 11 the chips. They're not pointing to any evidence that
10:47 12 the chip temperature or the PCB board temperature is
10:47 13 actually adapted to coordinate the operation of
10:47 14 anything that they've pointed to as the primary or
10:47 15 secondary circulation facilities.

10:47 16 And to -- just to conclude, at minimum,
10:47 17 Your Honor, I hope we have at least made the case
10:47 18 narrower on doctrine of equivalents, because they did
10:47 19 not -- they can't save that by just saying, Oh, but we
10:47 20 attached our expert report.

10:48 21 Well, our brief went through the expert
10:48 22 report and explained why what the expert said couldn't
10:48 23 count -- wasn't enough to get to a jury on doctrine of
10:48 24 equivalents. And they made no attempt to defend that,
10:48 25 and they shouldn't get to revive it now.

10:48 1 MR. KOLEGRAFF: Your Honor?

10:48 2 THE COURT: Yes, sir.

10:48 3 MR. KOLEGRAFF: May I address those

10:48 4 points or...

10:48 5 Yes. So you asked if we ever described
10:48 6 where we get our plain meaning that the temperature
10:48 7 probe does not have to be in the tank. I don't want to
10:48 8 repeat myself, but yes. We did have evidence that
10:48 9 we've shown the Court today.

10:48 10 For example, Figure 4 and Figure 12 of
10:48 11 the patent shows that the sensors don't have to be in
10:48 12 the tank. Figure 13 actually shows that you could have
10:48 13 the sensors on the fluid lines and the reservoir. You
10:48 14 could have it on the -- on the coolant lines. You
10:48 15 could have it in the primary. You could have it in the
10:48 16 secondary.

10:48 17 You can put that -- those temperature
10:48 18 probes wherever you want them and still control the
10:48 19 primary and secondary circulation of those.

10:48 20 Something we have to understand when we
10:49 21 look at the Rhodium system, because we're talking about
10:49 22 primary versus secondary, here the primary is the
10:49 23 portion of the system that takes the fluid and flows it
10:49 24 through the tank, which extracts heat from the miner.
10:49 25 The secondary's what happens out at the coolers, where

10:49 1 you take that fluid and cool it through the evaporative
10:49 2 cooler.

10:49 3 So where do we have to measure? This is
10:49 4 our Point No. 2.

10:49 5 So she's saying we haven't talked about
10:49 6 where we actually take the measurements. Well, if
10:49 7 you're talking about Prime Controls, they take the
10:49 8 measurements all over the place.

10:49 9 Their system has no noninfringing
10:49 10 functionality. It is adapted to take the temperatures
10:49 11 and control the fans.

10:49 12 True. At this exact moment in time the
10:49 13 wires haven't been hooked up, but we have evidence, we
10:49 14 have the e-mail that says they are planning to hook
10:49 15 these things up when they get the chance.

10:49 16 So they are going to use this system at
10:49 17 some point. It's just not believable that you're going
10:49 18 to have millions of dollars worth of control equipment
10:49 19 sitting there, all of these computers, a room full of
10:49 20 computers meant to control this facility, and you're
10:50 21 not going to turn it on.

10:50 22 So again, the same thing with the Prime
10:50 23 Control and the Kelvion. Even though it can't measure
10:50 24 today, it certainly is adapted to.

10:50 25 Now, again, Ms. Brannen said that I

10:50 1 misquoted how the Guntner works. I thought I got that
10:50 2 right, because I do understand that what's flowing --
10:50 3 what we are measuring is the output of the Guntner
10:50 4 cooler. That is true.

10:50 5 And that -- and I think I pointed out
10:50 6 that the output of the Guntner cooler is actually the
10:50 7 input to the tank.

10:50 8 So we are measuring the fluid temperature
10:50 9 of the temperature in the tank. It's just we're
10:50 10 measuring that at the input line rather than the output
10:50 11 line.

10:50 12 So she asked: How is that coordinating
10:50 13 primary and secondary?

10:50 14 Well, you have the fans on the Guntner
10:50 15 cooler, which are adjusting to keep that output at a
10:50 16 certain temperature or temperature range to make sure
10:50 17 the miners are being cooled. That is affecting the
10:51 18 temperature of the fluid as it flows through the
10:51 19 primary system and through the secondary system.

10:51 20 We are coordinating the control of the
10:51 21 facilities by using the output temperature from that
10:51 22 Guntner cooler.

10:51 23 As far as the Restful API, I think we've
10:51 24 shown pretty strongly in the expert report that we are
10:51 25 measuring at a temperature of the fluid using the PCB

10:51 1 inside the miner itself, and then that is used to reset
10:51 2 the miner to either increase power if it can be run
10:51 3 warmer or decrease power if you need it to run cooler.

10:51 4 So I think we've shown this in all of it.
10:51 5 Again, there's a -- plenty of genuine issues of fact
10:51 6 here for denying this motion.

10:51 7 THE COURT: I'll be back in a few
10:51 8 seconds.

10:51 9 (Pause in proceedings.)

10:54 10 THE COURT: The Court is going to grant
10:55 11 the motion for summary judgment of noninfringement. I
10:55 12 think that fully takes care of the case for the time
10:55 13 being.

10:55 14 I'm not going to take up the motions in
10:55 15 limine given my ruling on that motion, which I think
10:55 16 obviates the need for a trial at this time.

10:55 17 Is there anything else we need to take up
10:55 18 today?

10:55 19 MR. KOLEGRAFF: Your Honor, would we be
10:55 20 able to readdress this -- after we get Pokharna's
10:55 21 report redone, would we be able to readdress this issue
10:55 22 on the motion for summary judgment?

10:55 23 THE COURT: Well, you know, you have --
10:55 24 you've had your chance, but obviously, it's a fairly
10:55 25 severe ruling. Let me talk to my clerks and see if

10:55 1 they think anything additional that an expert would say
10:56 2 might benefit us. And if it is, we'll let you know.
10:56 3 As of right now, I don't think it would.

10:56 4 So anything besides that?

10:56 5 MR. SMITH: Your Honor, if I could ask
10:56 6 one more question about the Court's ruling.

10:56 7 There's been a fair amount of argument
10:56 8 today about how the systems are today versus after how
10:56 9 the systems are turned on or wired or whatever.

10:56 10 So I think we'd want to confirm the scope
10:56 11 of the Court's ruling so we would know whether a claim
10:56 12 against the facilities, once they're put into
10:56 13 operation, would be affected by the Court's ruling
10:56 14 today, or would that be a different set of facts?

10:56 15 THE COURT: That would be a different set
10:56 16 of facts. I don't know --

10:56 17 MR. SMITH: Thank you, Your Honor.

10:56 18 THE COURT: Yeah. I don't know that it
10:56 19 would change the ruling ultimately, but, you know, that
10:56 20 clearly is an issue in this case.

10:56 21 MR. SMITH: Okay. Thank you, Your Honor.

10:56 22 THE COURT: Okay. Have a good day. Take
10:56 23 care.

10:56 24 (Hearing adjourned.)

25

1 UNITED STATES DISTRICT COURT)
2 WESTERN DISTRICT OF TEXAS)
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5 I, Kristie M. Davis, Official Court
6 Reporter for the United States District Court, Western
7 District of Texas, do certify that the foregoing is a
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13 Certified to by me this 11th day of April
14 2024.

15
16 /s/ Kristie M. Davis
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